

From security to justice? The development of a more justice-oriented approach to the realisation of European minority rights standards

Article (Unspecified)

Craig, Elizabeth (2012) From security to justice? The development of a more justice-oriented approach to the realisation of European minority rights standards. *Netherlands Quarterly of Human Rights*, 30 (1). p. 40. ISSN 0924-0519

This version is available from Sussex Research Online: <http://sro.sussex.ac.uk/id/eprint/38581/>

This document is made available in accordance with publisher policies and may differ from the published version or from the version of record. If you wish to cite this item you are advised to consult the publisher's version. Please see the URL above for details on accessing the published version.

Copyright and reuse:

Sussex Research Online is a digital repository of the research output of the University.

Copyright and all moral rights to the version of the paper presented here belong to the individual author(s) and/or other copyright owners. To the extent reasonable and practicable, the material made available in SRO has been checked for eligibility before being made available.

Copies of full text items generally can be reproduced, displayed or performed and given to third parties in any format or medium for personal research or study, educational, or not-for-profit purposes without prior permission or charge, provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way.

FROM SECURITY TO JUSTICE? THE DEVELOPMENT OF A MORE JUSTICE-ORIENTED APPROACH TO THE REALISATION OF EUROPEAN MINORITY RIGHTS STANDARDS

ELIZABETH CRAIG*

Abstract

The aim of this article is to reassess the development and consolidation of minority rights in Europe with reference to Kymlicka's liberal theory of minority rights and to his own critique of the European minority rights framework. The article begins by revisiting the development of new minority rights norms within the security-focused agenda of the early 1990s. It then considers the role of the first OSCE High Commissioner on National Minorities in promoting a more justice-oriented approach before considering the significance of the coming into force of the Council of Europe's Framework Convention for the Protection of National Minorities and the development of the work of its Advisory Committee. The article argues that there is evidence that a more justice-oriented approach to the realisation of European minority rights standards is emerging, particularly under the Framework Convention.

Keywords: Council of Europe; Framework Convention for the Protection of National Minorities; justice; minority rights in Europe; OSCE High Commissioner on National Minorities; security

1. INTRODUCTION

The 'internationalisation' of minority rights over the last two decades has created a number of new 'dilemmas' about the appropriateness of prioritising the needs of

* PhD, Lecturer in Law at the University of Sussex. The author would like to thank Stephanie Berry, Dr. Yuri Borgmann-Prebil, Dr. Charlotte Skeet, Prof. Malcolm Ross and three anonymous referees for their comments on earlier drafts of this article. All errors and omissions remain the author's own. Websites were last visited 16 December 2011.

particular minority groups over others and about the relationship between different approaches to the protection and promotion of minority rights in Europe.¹ Whilst the engagement of the Organisation for Security and Co-operation in Europe (OSCE), formerly the Conference on Security and Co-operation in Europe (CSCE), has been strongly influenced by its role as a regional security organisation, the Council of Europe's involvement can be linked to its interest in democratisation and human rights.² Although significant differences in the approach of both organisations might therefore have been expected, Kymlicka has argued that within both organisations the longer-term goal of achieving justice for minorities through the promotion of multiculturalism was effectively abandoned and that it was the shorter-term security agenda that prevailed in the 'pan-European' experiment in the 'internationalisation' of minority rights.³ The aim of this article is to reassess the development and consolidation of minority rights in Europe with reference to Kymlicka's own critique of the European minority rights framework. The article will argue, contrary to Kymlicka's assertions, that a more justice-oriented approach to the realisation of European minority rights standards is in fact emerging, particularly under the Framework Convention for the Protection of National Minorities (Framework Convention).⁴ The article will highlight trends in more recent Opinions of the Framework Convention Advisory Committee and in its thematic commentaries, trends that are not considered in Kymlicka's earlier assessment, which focuses primarily on the development of new minority rights standards and on conflict prevention initiatives.⁵

The article begins with a provisional explanation of Kymlicka's assessment before reappraising the significance of the development of new minority rights standards in the late 1980s and early 1990s. It then highlights the perceived interdependence and complementarity of the two approaches, focusing on the increased reliance by the first OSCE High Commissioner on National Minorities (HCNM), Max van der Stoep, on justice based approaches to support his conflict prevention mandate. The focus then shifts to the Framework Convention and to the significance of the thematic work of both the HCNM and the Framework Convention Advisory Committee. The article asserts that recent years have seen a considerable strengthening of the justice track and that this has increased the legitimacy of the European minority rights system. It argues that the key development in relation to the consolidation of minority rights in Europe has been the coming into force of the Framework Convention, which has been accompanied by a significant shift in thinking about the potential scope of application

¹ Kymlicka, W., *Multicultural Odysseys: Navigating the New International Politics of Diversity*, Oxford University Press, Oxford, 2007, pp. 8–9. See also Sasse, G., 'Securitization or Securing Rights? Exploring the Conceptual Foundations of Policies Towards Minorities and Migrants in Europe', *Journal of Common Market Studies*, Vol. 43, 2005, pp. 673–693.

² Malloy, T.H., *National Minority Rights in Europe*, Oxford University Press, Oxford and New York, 2005, pp. 2–3.

³ Kymlicka, *op.cit.* (note 1) at p. 214. See also chapter 6 on 'The European Experiment.'

⁴ CETS No. 157 (opened for signature 1 February 1995, came into force 1 February 1998).

⁵ Kymlicka, *op.cit.* (note 1), pp. 196–246.

of minority rights standards and the development of a more justice-oriented approach to minority rights in Europe.

2. SETTING THE CONTEXT

In the early 1990s the main focus within both the OSCE and the Council of Europe was the situation of ‘autochthonous’ or ‘national’ minorities within States. The European minorities issue, or *problématique*, has however become more complex in recent years with reports of increased intolerance and discrimination, particularly against the Roma, immigrants and asylum-seekers and those belonging to certain religious groups.⁶ The ethnic diversity that exists in Europe is now quite considerable⁷ and continues to pose significant challenges for academics and practitioners working in this area, many of whom have been influenced by Kymlicka’s work.⁸ The main aspects of Kymlicka’s liberal theory of minority rights⁹ include the identification of cultural membership as a primary good in the Rawlsian sense; the importance of societal cultures, which provide their members ‘with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational and economic life, encompassing both public and private spheres’;¹⁰ and the call for minority rights to address the injustices caused by majority nation-building.¹¹

Kymlicka’s criticisms of the ‘justice’ track are directed at the failure to recognise a right of those belonging to national minorities to autonomy, or self-government, in the development of new minority rights standards, as well as on the issue of

⁶ See *Living Together: Combining Diversity and Freedom in 21st Century Europe*, Report of the Group of Eminent Persons of the Council of Europe (2011), available at human-rights-convention.org/2011/05/11/living-together-combining-diversity-and-freedom-in-21st-century-the-group-of-eminent-persons-presents-its-report/.

⁷ On different types of ethnic minorities in contemporary Europe, see Wolff, S., *Ethnic Minorities in Europe: The Basic Facts*, 2010, available at www.stefanwolff.com/files/min-eu.pdf.

⁸ This is reflected in numerous special issues of journals and symposia devoted to his work, e.g. *Journal of Ethnopolitics and Minority Issues in Europe*, Vol. 4, 2002; *Ethnopolitics*, Vol. 6, 2007, pp. 585–623 and *Ethnicities*, Vol. 8, 2008, pp. 251–283. See also Kymlicka, W. and Opalski, M. (eds.), *Can Liberal Pluralism Be Exported? Western Political Theory and Ethnic Relations in Eastern Europe*, Oxford University Press, Oxford and New York, 2001. For the use of Kymlicka’s work in recent legal analysis, see Ringelheim, J., ‘Minority Rights in a Time of Multiculturalism: The Evolving Scope of the Framework Convention for the Protection of National Minorities’, *Human Rights Law Review*, Vol. 10, 2010, pp. 99–128 and Craig, E., ‘The Framework Convention for the Protection of National Minorities and the Development of a “Generic Approach” to the Protection of Minority Rights in Europe?’, *International Journal on Minority and Group Rights*, Vol. 17, 2010, pp. 307–325.

⁹ See in particular Kymlicka, W., *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Clarendon Press, Oxford, 1995.

¹⁰ *Ibidem*, at p. 76.

¹¹ Kymlicka, W., ‘Western Political Theory and Ethnic Relations in Eastern Europe’, in: Kymlicka and Opalski (eds.), *op.cit.* (note 8), pp. 1–105.

enforcement.¹² Meanwhile, his criticisms of the ‘security track’ are mainly focused on the work of the HCNM, whose country recommendations often went further than the standards required under international human rights law and played a key role in relation to EU accession.¹³ His argument is that these outputs, whilst highly influential in the late 1990s, raised issues of legitimacy as they were ‘not grounded in principles of justice’ and were perceived as creating double standards.¹⁴ The implication is that the development of a more justice-oriented approach based on fairness rather than political expediency would serve to increase the legitimacy of the minority rights norms developed within the security-focused agenda of the early 1990s. These arguments are developed further in *Multicultural Odysseys*,¹⁵ which cautions against the over-securitisation of minority issues and the ‘trumping’ of security over justice.¹⁶ The controversial distinction that Kymlicka draws between the claims of ‘national’ and immigrant minorities in relation to special representation and self-government rights is not so significant for the purpose of this article given the nature of the rights currently recognised under the European minority rights framework.¹⁷ This is explored further in section 6, which considers the thematic work of the Framework Convention Advisory Committee.

The position adopted in this article is that the Framework Convention is not as weak and ineffective an instrument as Kymlicka fears. Furthermore, it would appear that the Framework Convention has a key role to play in promoting liberal multicultural policies, which recognise ‘the legitimate interests of minorities in their identity and culture [...] without having to compromise on a society’s commitment to individual freedom, equal opportunity and social solidarity’.¹⁸ This is significant given contemporary debates on the future of multiculturalism, particularly in relation to immigrants,¹⁹ and about the extent to which international law should be involved in the promotion of multicultural policies.²⁰ Indeed, the evidence presented

¹² Kymlicka, W., ‘Reply and Conclusion’ in Kymlicka and Opalski (eds.), *op.cit.* (note 8), pp. 347–413, at pp. 372–373.

¹³ *Ibidem*, at pp. 374–375.

¹⁴ *Ibidem*, at p. 387.

¹⁵ Kymlicka, *op.cit.* (note 1), in particular chapter 6 ‘The European Experiment’.

¹⁶ *Ibidem*, at pp. 190–192.

¹⁷ This distinction was discussed in depth in an earlier article by this author. See Craig, *loc.cit.* (note 8).

¹⁸ Kymlicka, W., ‘Testing the Liberal Multiculturalist Hypothesis: Normative Theories and Social Science Evidence’, *Canadian Journal of Political Science*, Vol. 43, 2010, pp. 257–271, at p. 258.

¹⁹ E.g. Angela Merkel, Chancellor of Germany 16 October 2010 ‘Multikultiistgescheitert’, available at www.zdf.de/ZDFmediathek/beitrag/video/1166434/Integration-Multikulti-ist-tot (31 August 2011) and the views of David Cameron, UK Prime Minister 5 February 2011, on the failure of ‘state multiculturalism’, available at www.bbc.co.uk/news/uk-politics-12371994. See also Lentin, A. and Titley, G., *The Crises of Multiculturalism: Racism in a Neo-Liberal Age*, Zed Books, London, 2011.

²⁰ E.g. McGoldrick, D., ‘Multiculturalism and its Discontents’, *Human Rights Law Review*, Vol. 5, 2005, pp. 27–56 and Xanthaki, A., ‘Multiculturalism and International Law: Discussing Universal Standards’, *Human Rights Quarterly*, Vol. 32, 2010, pp. 21–48.

here would appear to support Kymlicka's own view that predictions of the 'demise' of multiculturalism and the heralding of a new 'post-multicultural era' are premature.²¹

3. THE DEVELOPMENT OF NEW MINORITY RIGHTS NORMS WITHIN THE SECURITY-BASED AGENDA OF THE EARLY 1990s

The historical background to the development of new norms and procedures addressing minority issues following the end of the Cold War has been comprehensively examined in the literature,²² and a number of researchers have adopted either a thematic or a case-study approach to the study of their application in specific minority situations.²³ The aim of this section is to reassess the developments in light of Kymlicka's arguments about the development of two separate minority rights tracks. The view at the end of the 1980s/beginning of the 1990s appeared to be that the two approaches could be combined. The recognition in 1992 that the dual goals of preventing conflict and maintaining peace and security required a 'commitment to human rights with a special sensitivity to those of minorities, whether ethnic, religious, social or linguistic' by the UN Secretary-General, Boutros-Ghali,²⁴ reflected an emerging international consensus at that time.²⁵ This acknowledgment coincided with increased recognition within international human rights law of a more justice-oriented approach based on the recognition of the importance of religious, cultural and/or linguistic affiliation to individuals belonging to minority groups.²⁶

The CSCE was the first of the European organisations to take the initiative in developing new political norms outlining the special rights of individuals belonging to national minorities in section IV of the 1990 Copenhagen Document.²⁷ The term

²¹ Kymlicka, W., 'The Rise and Fall of Multiculturalism: New Debates on Inclusion and Accommodation in Diverse Societies', *International Social Science Journal*, Vol. 61, 2010, pp. 97–112.

²² E.g. Cumper, P. and Wheatley, S. (eds), *Minority Rights in the 'New' Europe*, MartinusNijhoff Publishers, The Hague, London and Boston, 1999 and Pentassuglia, G. *Minorities in International Law*, Council of Europe Publishing, Strasbourg Cedex, 2002.

²³ E.g. Weller, M. (ed), *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities*, Oxford University Press, Oxford, 2005 and Letschert, R.M., *The Impact of Minority Rights Mechanisms*, TMC Asser Press, The Hague, 2005.

²⁴ Boutros-Ghali, B., An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping, UN Doc. A/47/277-S/2411 (1992), para. 18.

²⁵ See, in particular, UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UNGA Res 47/135 of 18 December 1992.

²⁶ On the predominance of this approach to minority rights in international law more generally, see Macklem, P., 'Minority Rights in International Law', *International Journal of Constitutional Law*, Vol. 6, 2008, pp. 531–552, who himself argues for an approach to minority protection focused on the injustices and wrongs created by the international order itself.

²⁷ The Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE was adopted on 29 June 1990.

‘national minority’ was used but not defined, although it is widely accepted that the primary concern was the situation of ‘established’ minorities, especially those with kin-States.²⁸ These political commitments on minority issues were generally well-received by minority rights commentators²⁹ and included positive undertakings in relation to the promotion of minority identity, minority language education, the teaching of history and culture, effective participation in public affairs and in ensuring full equality with other citizens.³⁰ Of particular significance was the identification of the establishment of ‘appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances of such minorities and in accordance with the policies of the State concerned’ as a possible way of ensuring conditions for the promotion of ‘the ethnic, cultural, linguistic and religious identity of certain national minorities’.³¹ This step was the first explicit endorsement of territorial autonomy by an international organisation in the post-Cold War era and, therefore, considered by Kymlicka to be a welcome international development.³² Kymlicka’s assessment is of course linked to his liberal theory of minority rights, which calls for the granting of self-government and special representation rights to national minority groups.³³

The background to the Council of Europe’s decision to adopt a framework convention and not to proceed with a cultural rights Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) has been explored elsewhere.³⁴ The decision to adopt a framework convention with ‘programme type provisions’³⁵ mirrored developments in other areas of international law at that time.³⁶ As an instrument containing general principles rather than detailed rules, with compliance to be monitored by a political body assisted by an advisory committee of experts as opposed to a judicial or quasi judicial body, the Framework Convention can usefully be characterized as an instrument with legal significance,

²⁸ Constantinides, A., ‘The Involvement of the Organization for Security and Cooperation in Europe in Issues of Minority Protection’, *Leiden Journal of International Law*, Vol. 9, 1996, pp. 373–395, at p. 379.

²⁹ *Idem.* See also Bloed, A., ‘The OSCE and the Issue of National Minorities’, in: Phillips, A. and Rosas, A. (eds.), *Universal Minority Rights*, ÅboAkademi University Institute for Human Rights and Minority Rights Group (International), Turku/Åbo and London, 1995, pp. 113–122, at pp. 114–115.

³⁰ *Ibidem*, paras. 30–40.

³¹ *Ibidem*, para. 35.

³² Kymlicka, *op.cit.* (note 1), pp. 206–207 and (note 12) p. 371.

³³ Kymlicka, *op.cit.* (note 9).

³⁴ E.g. Craig, E., ‘The Framework Convention for the Protection of National Minorities and the Northern Ireland Bill of Rights Process’, *Northern Ireland Legal Quarterly*, Vol. 60, 2009, pp. 201–11, at pp. 204–206.

³⁵ Explanatory Report, para. 11.

³⁶ E.g. Framework Convention on Climate Change 9 May 1992. See also Dupuy, D.-M., ‘Soft Law and the International Law of the Environment’, *Michigan Journal of International Law*, Vol. 12, 1990–91, pp. 420–435 and Abbott, K.W. and Snidal, D., ‘Hard and Soft Law in International Governance’, *International Organization*, Vol. 54, 2000, pp. 421–456.

coming somewhere in the middle of the hard-soft law spectrum.³⁷ One of the problems with criticisms of what Kymlicka has in the past labelled the ‘legal rights track’³⁸ is the assumption that effective minority protection requires the creation of justiciable rights or that such rights are ‘the alpha and the omega for minority protection’.³⁹ Certainly such rights have their place,⁴⁰ and renewed initiatives to draft a minority rights protocol to the ECHR should be supported.⁴¹ Nevertheless, the potential reach and significance of ‘softer’ law, especially in the area of minority rights,⁴² should not be underestimated.⁴³

By the time of the adoption of the Vienna Declaration in October 1993⁴⁴ it was widely accepted within the Council of Europe that protection of ‘national minorities’ was ‘an essential element of stability and democratic security in our continent’⁴⁵ and the conclusion reached by Member States was that the way forward was to attempt to transform ‘to the greatest possible extent’ the political commitments in the Copenhagen Document into legally binding obligations.⁴⁶ The Framework Convention imposes obligations on States in relation to equality, the promotion of cultural identity and of mutual respect and understanding⁴⁷ and the recognition of individual freedoms that ‘are particularly relevant for the protection of national minorities’⁴⁸ (that is, the rights to freedom of peaceful assembly, association, expression and thought, conscience and religion).⁴⁹ It also imposes positive State obligations in relation to the use of minority languages in relations with administrative authorities⁵⁰ and the use and display of

³⁷ Abbott, K.W. *et al.*, ‘The Concept of Legalization’, *International Organization*, Vol. 54, 2000, pp. 401–419, at p. 406.

³⁸ Kymlicka, *op.cit.* (note 1), at p. 238.

³⁹ Malik, M., ‘Minority Protection and Human Rights’, in: Campbell, T, Ewing, K.D. and Tomkins, A. (eds.), *Sceptical Essays on Human Rights*, Oxford University Press, Oxford, 2001, pp. 277–296, at p. 277.

⁴⁰ E.g. Pentassuglia, G., *Minority Groups and Judicial Discourse in International Law: A Comparative Perspective*, MartinusNijhoff Publishers, The Hague, London, New York, 2009.

⁴¹ E.g. Parliamentary Assembly of the Council of Europe’s Committee on Legal Affairs and Human Rights, ‘An additional protocol to the European Convention on Human Rights on national minorities’, CoE Doc. AS/Jur (2011) 46 (8 November 2011).

⁴² Craig, E., ‘From Soft to Hard Law? Addressing Culture, Identity and Language Issues within the Northern Ireland Bill of Rights Process’, *Focaal Journal of Global and Historical Anthropology*, Vol. 56, 2010, pp. 35–48, at pp. 36–39.

⁴³ E.g. Letschert, *op.cit.* (note 23).

⁴⁴ ‘Vienna Declaration of the Heads of State and Government of the Member States of the Council of Europe on the Reform of the Control Mechanism of the ECHR, on National Minorities, and on a Plan of Action against Racism’, 9 October 1993, *Human Rights Law Journal*, Vol. 14, 1993, pp. 373–375.

⁴⁵ *Ibidem*, at p. 373.

⁴⁶ *Ibidem*, at p. 375.

⁴⁷ Arts. 4–6.

⁴⁸ Explanatory Report, para. 51.

⁴⁹ Arts. 7–9.

⁵⁰ Art. 10.

names, including street names and other topographical indications,⁵¹ as well as in the area of education⁵² and with regard to the creation of the conditions necessary for effective participation.⁵³

Kymlicka's own verdict was that the new 'justice-based' track to minority rights in Europe, manifested in the development of new minority rights standards, was 'very weak'. This was because of the lack of an explicit endorsement of territorial autonomy for national minorities in the Framework Convention,⁵⁴ the neglect of issues relating to official language status and mother-tongue universities⁵⁵ and the lack of effective enforcement mechanisms.⁵⁶ The neglect of such substantive issues in the Framework Convention, as well as the failure to define the term 'national minority', can be linked to its status as a multilateral human rights treaty imposing legal obligations on States and the need to achieve a consensus amongst States.⁵⁷ Some attempted definitions of the term 'national minority' have been quite broad, covering groups of citizens who 'maintain longstanding, firm and lasting ties' with the State and who 'display distinctive ethnic, cultural, religious or linguistic characteristics'.⁵⁸ It was nonetheless clear that what the drafters of the minority provisions in both the Copenhagen Document and the Framework Convention had in mind were the fundamental political changes taking place in Europe at that time, including the developing situations in the former Yugoslavia and the former Soviet Union. Their main attention was, therefore, focused on the situation of 'national minorities' with kin-States. It was not, meanwhile, self-evident that consideration of such substantive issues would be excluded from the remit of the Advisory Committee established to assist in monitoring compliance with State undertakings, as discussed further below.

4. SECURITY THROUGH JUSTICE? THE TRANSITIONAL ROLE OF THE FIRST OSCE HIGH COMMISSIONER ON NATIONAL MINORITIES

Kymlicka's argument is that the justice-based track initiated through the development of new minority rights norms was essentially overshadowed by the 'new contextual, security-based minority rights track' developed subsequently within the context

⁵¹ Art. 11.

⁵² Arts. 12–14.

⁵³ Art. 15.

⁵⁴ Kymlicka, *op.cit.* (note 12), at pp. 371–373.

⁵⁵ *Ibidem*, at p. 373.

⁵⁶ *Ibidem*, at p. 386.

⁵⁷ Explanatory Report, para. 12.

⁵⁸ See, in particular, Art. 1 of PACE Recommendation 1201 (1993) on an additional protocol on the rights of national minorities to the European Convention on Human Rights, 1 February 1993.

of the OSCE and EU accession negotiations.⁵⁹ There is certainly some *prima facie* evidence of this. Although one of the priorities for the CSCE/OSCE in the early 1990s was the strengthening of the procedures developed under the human dimension, limited use has been made of these mechanisms, particularly in the area of minority rights.⁶⁰ The decision in 1992 to establish the Office of the HCNM as ‘an instrument of conflict prevention at the earliest possible stage’⁶¹ was, therefore, a much more significant initiative, clearly linked to developments in the former Yugoslavia and the former Soviet Union that disrupted the initial mood of ‘euphoria and optimism’ after the end of the Cold War.⁶² The HCNM’s mandate relates to tensions involving national minority issues, which ‘have the potential to develop into a conflict within the CSCE area, affecting peace, stability or relations between participating States’.⁶³ It was envisaged that this would be achieved through ‘early action’ and ‘early warning’,⁶⁴ which has been interpreted as requiring the HCNM ‘to try to contain and de-escalate tensions’ and to act as a ‘trip-wire’ by alerting the OSCE to tensions threatening to escalate to such an extent that they can no longer be contained by him.⁶⁵ In response to requests from Turkey and the UK, the HCNM is precluded from considering situations involving organised acts of terrorism,⁶⁶ which contributed to the general perception that it was not intended that the HCNM’s role would be extended to Western States and led to accusations of ‘double standards’.⁶⁷ The HCNM’s mandate requires him to work independently of all the parties directly involved⁶⁸ and authorises him to collect and receive information from a range of sources, including the media and non-governmental organisations (NGOs).⁶⁹ It also envisages visits to the States concerned to obtain first-hand information about the situation of national minorities from all parties directly involved, to discuss the issues and ‘where appropriate promote

⁵⁹ Kymlicka, *op.cit.* (note 12), at p. 372.

⁶⁰ For further information, see Neukirch, C., Simhandl, K. and Wolfgang, Z., ‘Implementing Minority Rights in the Framework of the CSCE/OSCE’, in: *Mechanisms for the Implementation of Minority Rights*, Council of Europe Publishing, Strasbourg Cedex, 2004, pp. 159–181, at pp. 167–168.

⁶¹ Helsinki Document 1992: The Challenges of Change, 9 July 1992, II, para 2.

⁶² Roth, S.J., ‘Comments on the CSCE meeting of experts on national minorities and its concluding document’, *Human Rights Law Journal*, Vol. 12, 1991, pp. 330–331, at p. 331.

⁶³ Helsinki Document, *loc.cit.* (note 61), section II, para. 3.

⁶⁴ *Ibid.*

⁶⁵ HCNM ‘Mandate: Early Warning and Early Action’, available at www.osce.org/hcnm/43201.

⁶⁶ This did not however prevent the consultation of the HCNM’s office in debates over the content of a Bill of Rights in Northern Ireland. See McCrudden, C., ‘Consociationalism, Equality and Minorities in the Northern Ireland Bill of Rights Debate: The Role of the OSCE High Commissioner on National Minorities’ in Morison, J., McEvoy, K. and Anthony, G. (eds.), *Judges, Transition and Human Rights*, Oxford University Press, Oxford, 2007, pp. 315–354.

⁶⁷ Helsinki Document, *loc.cit.* (note 61), section II, para. 5. On the ‘terrorism clause’, see Heintze, J.J., ‘Minority Issues in Western Europe and the OSCE High Commissioner on National Minorities’, *International Journal on Minority and Group Rights*, Vol. 7, 2000, pp. 381–392, at pp. 386–388.

⁶⁸ Helsinki Document, *loc.cit.* (note 61), section II, para. 4.

⁶⁹ *Ibidem*, at paras. 11 and 23.

dialogue, confidence and co-operation between them'.⁷⁰ However, the mandate notably excludes consideration of violations of OSCE commitments with regard to individuals belonging to a national minority.⁷¹ There is, therefore, no doubt that the role was initially conceived 'as a security instrument of strictly preventive diplomacy' rather than an instrument charged with the promotion and protection of the rights of national minorities and the promotion of justice for those belonging to minority groups.⁷²

There has been much debate about the extent to which Kymlicka's theory of minority rights can be applied in a 'desecuritisation' context,⁷³ which he relates to the idea of different security thresholds in Western and Eastern and Central European (ECE) States⁷⁴ and to key differences in their responses to claims associated with 'minority nationalism'.⁷⁵ It is, of course, in such a context that potential tensions between a justice/rights-based approach and a more security-based agenda are likely to emerge. Whilst such tensions form the basis of Kymlicka's assessment, particularly in relation to inconsistencies in the HCNM's approach on autonomy,⁷⁶ this article adopts a different approach by examining the evidence of a more justice-based approach in the work of the HCNM, despite the constraints of his mandate and the geopolitical context within which his role was developed.

The development of two completely separate but parallel minority rights tracks or approaches was certainly not the aim of those responsible for developing a new regime for the protection of minority rights in Europe, as was acknowledged in the Preamble to the Framework Convention, which states 'that the upheavals of European history have shown that the protection of national minorities is essential to stability, democratic security and peace in this continent'. This interconnectedness is illustrated further in the work of the HCNM, who played an important transitional role in the promotion of a more justice-oriented approach to the protection of minority rights in Europe, despite the initial conception of the Office of the HCNM as a security instrument.

⁷⁰ *Ibid.*

⁷¹ *Ibidem*, at para.5.

⁷² Letschert, *op.cit.* (note 23), at p. 47.

⁷³ E.g. Kymlicka and Opalski (eds.), *op.cit.* (note 8).

⁷⁴ Kymlicka invokes the idea of different security thresholds in Western democracies and in the ECE, noting that a range of minority claims can trigger the security card in ECE States, not only in relation to self-government but also in relation to claims in education and to official language status. (Kymlicka, W., 'Justice and Security in the Accommodation of Minority Nationalism', in: May, S., Modood, T. and Squires, J. (eds.), *Ethnicity, Nationalism and Minority Rights*, Cambridge University Press, Cambridge, 2004, pp. 144–175, at p. 159).

⁷⁵ *Ibidem*, at pp. 144–145. According to Kymlicka: 'In the West, they are assessed primarily in terms of *justice*. The goal is to find an accommodation that is more or less fair to both majority and minority. [...] In the ECE, the claims of minorities are primarily assessed in terms of *security*. The goal is to ensure that minorities are unable to threaten the existence or territorial integrity of the state [...]'.⁷⁶

⁷⁶ Kymlicka, *op.cit.* (note 12), at pp. 376–387 and (note 1), at pp. 236–238.

The first HCNM, Max van der Stoep, took up the role in January 1993. His tenure ended in 2001.⁷⁷ It is not disputed that the primary focus of the first HCNM's work was on conflict prevention, with particular emphasis placed on 'quiet diplomacy' in relation to the conduct of State visits and the issuing of country-specific recommendations.⁷⁸ Although such recommendations from the HCNM were not envisaged in the original mandate, which refers to advice and recommendations requested from experts,⁷⁹ it is clear that his approach to country recommendations was very much driven by his conflict prevention mandate. For example, the HCNM devoted considerable early attention to issues relating to citizenship and naturalisation in Estonia and the related need to ensure adequate knowledge of the Estonian language,⁸⁰ mindful of the potential threat of tensions with Russia over the situation of the Russian minority.⁸¹ The situation of Hungarians in Slovakia and Romania was considered by many to pose an even greater threat to European stability⁸² with tensions over education causing considerable disruption in Slovakia between 1994 and 1998⁸³ and in Romania.⁸⁴ As a consequence, whilst the HCNM's early recommendations to Romania addressed a wide range of issues,⁸⁵ the main focus of his attention from 1996 was on education and, in particular, on the demands of the Hungarian minority in relation to higher education, which were threatening the survival of the ruling coalition.⁸⁶ The selectivity required by his mandate ensured that his role would not be an uncontroversial one. It has, for example, been argued in relation to the HCNM's role in Estonia that the HCNM was 'not so much concerned with the situation of the Russian-speaking minority in Estonia, but rather with possible reactions of Russia'.⁸⁷

The aim of this section is not however to assess the success or otherwise of a more 'security-focused approach'.⁸⁸ Instead, the focus is on the contribution made by the

⁷⁷ HCNM 'Overview', available at www.osce.org/hcnm/43199.

⁷⁸ E.g. Kemp, W.A., *Quiet Diplomacy in Action: The OSCE High Commissioner on National Minorities*, Kluwer Law International, The Hague/London/Boston, 2001.

⁷⁹ Helsinki Document, *loc.cit.* (note 61), section II, para. 34.

⁸⁰ E.g. Letters to the Minister of Foreign Affairs of the Republic of Estonia dated 6 April 1993, 9 March 1994, 11 December 1995, 28 October 1996 and 21 May 1997.

⁸¹ Sarv, M., 'Integration by Reframing Legislation: Implementation of the Recommendations of the OSCE High Commissioner on National Minorities to Estonia, 1993–2001', *Working Paper 7*, Centre for OSCE Research, Hamburg, 2002, at pp. 8–9.

⁸² Horváth, I., 'Facilitating Conflict Transformation: Implementation of the Recommendations of the OSCE's High Commissioner on National Minorities to Romania, 1993–2001', *Working Paper 8*, Centre for OSCE Research, Hamburg, 2002, at p. 10.

⁸³ Csáky, P., (Deputy Prime Minister, Slovak Republic), 'Experiences from Co-operating with the OSCE HCNM: The Case of the Slovak Republic', *International Journal on Minority and Group Rights*, Vol. 8, 2001, pp. 21–22.

⁸⁴ Horváth, *op.cit.* (note 82), chs. 3 and 4.

⁸⁵ E.g. Letter to the Minister for Foreign Affairs of Romania dated 9 September 1993.

⁸⁶ Horváth, *op.cit.* (note 82), at pp. 98–116.

⁸⁷ Sarv, *op.cit.* (note 81), at p. 108.

⁸⁸ For such an assessment, see Nobbs, K., 'The Effective Protection of Minorities in the Wider Europe: Counterbalancing the Security Track', in: Weller, M., Blacklock, D. and Nobbs, K., *The Protection of*

HCNM to the development of a more justice-based approach to minority rights in Europe in the transitional period before the coming into force of the Framework Convention. Kymlicka himself has noted Van der Stoel's concern to link his country recommendations to legal norms, as well as his role in initiating the further development of new norms through the drafting and approval of recommendations on key thematic issues.⁸⁹ Meanwhile, Ratner has identified five ways through which the HCNM sought to incorporate relevant international norms into his work: through (1) the 'translation' of norms into concrete, country-specific recommendations; (2) the 'elevation' of the norms into binding domestic law; (3) the 'mobilization of support' for his recommendations from other international actors; (4) the 'development' of new norms, particularly through the adoption of normative guidelines or recommendations of general application; and (5) through norm 'dissemination'.⁹⁰ The main focus in this section will be on the translation of norms into country-specific recommendations, with the significance of the development of thematic recommendations of more general application considered later.

The conclusion that Ratner draws is that the first HCNM's work revealed 'the inseparability of norm implementation and conflict prevention'.⁹¹ It is submitted here that the country recommendations of the first HCNM also demonstrate the continued interdependence of 'justice based' and 'security based' approaches. Of significance in this regard is the role played by Van der Stoel before the coming into force of the Framework Convention as 'the main European standard-implementing institution of commitments, both legal and non-legal, which are of particular relevance to the protection of national minorities and to the evolution of minority rights' at that time.⁹² The complementary roles of the Framework Convention Advisory Committee and the HCNM, as well as the collaboration between the two mechanisms, is often commented upon by those connected with the HCNM's office. The HCNM frequently worked to promote ratification of the Framework Convention, and argued in favour of its wider application.⁹³ There are, meanwhile, numerous examples of the first HCNM providing quite specific guidance to States on the application of relevant international

Minorities in the Wider Europe, Palgrave Macmillan, Basingstoke, 2008, pp. 276–287. She claims, for example, that the adoption of a security-focused approach may in fact have the 'diametrically opposed effect of actually exacerbating state intransigence and incentivizing minority violence' (at p. 278).

⁸⁹ Kymlicka, *op.cit.* (note 1), p. 238.

⁹⁰ Ratner, S.R., 'Does International Law Matter in Preventing Ethnic Conflict?', *New York University Journal of International Law and Politics*, Vol. 32, 2000, pp. 591–680, at pp. 620–647.

⁹¹ *Ibidem*, at p. 607.

⁹² Diacofotakis, Y.A., *Expanding Conceptual Boundaries: The High Commissioner on National Minorities and the Protection of Minority Rights in the OSCE*, Ant. N. Sakkoulas and Bruylant, Athens and Brussels, 2002, at p. 16.

⁹³ E.g. Packer, J., 'Setting the Framework Convention in a Wider Context: Achievements and Challenges', in: *Filling the Frame: Five Years of Monitoring the Framework Convention for the Protection of National Minorities*, Council of Europe Publishing, Strasbourg Cedex, 2004, at pp. 43–51 and Moran, B.F., 'The Use of the Framework Convention in the Activities of the OSCE

norms to specific minority situations.⁹⁴ His approach in this regard was more in line with the approach of international human rights monitoring bodies than his security-focused mandate would suggest.⁹⁵

The HCNM had an important role to play in this transitional period in making recommendations to States on the implementation of relevant provisions of the Framework Convention. This role was particularly evident in recommendations made to the Slovak Republic in 1996, which made reference to a number of provisions of the Framework Convention as well as to its Explanatory Report. For example, the HCNM stressed that conditions for private educational institutions should not go beyond those listed in paragraph 72 of the Explanatory Report in relation to Article 13. In relation to Article 12, the HCNM recommended a new investigation into whether the Nitra Pedagogical University could train a sufficient number of Hungarian teachers, and pointed out that paragraph 71 of the Explanatory Report suggested that the words 'access to textbooks' should include the publication of textbooks and their purchase in other countries.⁹⁶

There were also occasions when the first HCNM appeared to go beyond the requirements of international human rights law in promoting a more justice-oriented approach in accordance with the 'spirit' of the relevant provisions. For example, despite the fact that the relevant provisions do not confer a specific right to mother-tongue education at tertiary level, the HCNM expressed the view that it would not be desirable to include a provision in the revised Romanian Law on Education 'excluding the possibility of a state-funded university with education in a minority language' and suggested the establishment of a commission of independent experts to investigate whether such an institution was required. He also noted the advantages of the development of multiculturalism at the Babes-Bolyai University in Cluj, which enabled students to take separate courses in their mother tongue at the same university.⁹⁷ His support for the latter option was evident in his decision to take the unusual step of addressing recommendations directly to the senate of that University.⁹⁸

The evidence presented here would appear to support the argument made by Ratner about the extensive use of relevant international standards by the High Commissioner, thereby revealing the interdependence of the 'justice' and 'security'

High Commissioner on National Minorities', *Conference: Enhancing the Impact of the Framework Convention*, 9–10 October 2008, Strasbourg.

⁹⁴ See Ratner, *loc.cit.* (note 90), at pp. 623–636, who illustrates using the HCNM's recommendations in relation to higher education in Macedonia and in relation to citizenship and language in Latvia.

⁹⁵ See Horváth, *loc.cit.* (note 82), at pp. 95–96, referring to a statement by the HCNM on 1 September 1995 and Letter to the Minister of Foreign Affairs dated 2 March 1998 relating to the teaching of history and geography in Romania.

⁹⁶ Letter to the Minister for Foreign Affairs of the Slovak Republic, dated 13 August 1996.

⁹⁷ Letter to the Minister for Foreign Affairs of Romania, dated 2 March 1998.

⁹⁸ Recommendations on Expanding the Concept of Multiculturalism at the Babes-Bolyai University, Cluj-Napoca, Romania, 17 February 2000, and Letter to the Rector of the Babes-Bolyai University, dated 30 March 2000.

approaches. This argument is also supported by Packer's⁹⁹ assessment of 'the detailed analysis, generally legal in nature, which the HCNM applies to situations, aiming at politically possible (i.e. acceptable for the principal parties) solutions which are guided by applicable international norms and fall within the parameters of specific standards'.¹⁰⁰ Meanwhile, the development of more general thematic recommendations, which are often referred to by those seeking to protect and promote minority rights, are considered to be an important part of the first HCNM's legacy in promoting 'security through justice'.¹⁰¹ The significance of these recommendations is considered in section six of this article.

Despite these more justice-oriented initiatives, the extent to which the HCNM's office was able to promote a more universal 'justice' approach was always going to be limited due to the conflict-prevention focus of the mandate and the political nature of the HCNM's involvement with States. The current HCNM, Knut Vollebaek, has continued to monitor the situation in a number of ECE States that have ratified or acceded to the Framework Convention where there is a real and current threat of conflict.¹⁰² For example, recent visits have been made by the HCNM to North and South Ossetia, Abkhazia and Crimea.¹⁰³ The HCNM also continues to devote considerable attention to issues that now also come within the remit of the Framework Convention Advisory Committee.¹⁰⁴ Those associated with the work of the HCNM have continued to emphasise the complementary nature of the security and human rights approaches.¹⁰⁵ However, accusations of double standards continue to form the basis of criticisms of the HCNM's work.¹⁰⁶ It is therefore significant that the onus for the strengthening of the justice-based approach now lies with the Framework Convention Advisory Committee. Whilst the focus in this article so far has been on the interdependence and complementarity of the 'justice' and 'security' tracks, the next two sections will consider the development of a more justice-oriented approach under

⁹⁹ Former senior legal advisor to the HCNM.

¹⁰⁰ Packer, J., 'The Protection of Minority Language Rights through the Work of OSCE Institutions', in: Trifunovska, S. (ed), *Minority Rights in Europe: European Minorities and Languages*, TMC Asser Press, The Hague, 2000, pp. 255–274, at p. 259.

¹⁰¹ This term is often used to describe the work of the HCNM. See, for example, Sabanadze, N. (senior political adviser) and de Graaf, V. (legal adviser), 'Are Some States and Minorities More Equal Than Others? Double Standards and the Work of the OSCE High Commissioner on National Minorities' in Henrard, K. (ed.), *Double Standards Pertaining to Minority Protection*, MartinusNijhoff Publishers, Leiden and Boston, 2010, pp. 117–143, at pp. 128–133.

¹⁰² For a list of States Parties to the Framework Convention, see 'Framework Convention for the Protection of National Minorities Chart of Signatures and Ratifications', available at conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=157&CM=&DF=&CL=ENG.

¹⁰³ 'High Commissioner on National Minorities', *2010 Annual Report on OSCE Activities*, pp. 79–81.

¹⁰⁴ The 2010 report reveals that the HCNM has recently considered language and citizenship issues in Estonia, Latvia, Slovakia and Hungary; education issues in Moldova, Serbia (with a particular focus on higher education), Kosovo and the Former Yugoslav Republic of Macedonia as well as the situation of the Roma and Sinti (*ibidem*, at p. 81).

¹⁰⁵ Sabanadze and de Graaf, *op.cit.* (note 101).

¹⁰⁶ *Ibidem*, at pp. 124–128.

the Framework Convention and through the adoption of thematic recommendations of more general application.

5. FROM SECURITY TO JUSTICE? THE ROLE OF THE FRAMEWORK CONVENTION ADVISORY COMMITTEE

Whereas the mandate of the HCNM clearly relates to the prevention of conflict, the mandate of the Advisory Committee relates primarily to the protection of national minorities and of the rights of persons belonging to national minorities as an integral part of human rights.¹⁰⁷ As a number of Western democracies are States Parties to the Framework Convention,¹⁰⁸ the Advisory Committee is not vulnerable to the same accusations of ‘double standards’ as the HCNM. The Advisory Committee also tends to consider a much wider range of minority groups than the HCNM, who often focuses on the situation of minorities with kin-States, and to address a much broader range of issues and in a more consistent and predictable way.¹⁰⁹ This section focuses, in particular, on recommendations made by the Advisory Committee to ECE States, considering the pivotal role played by the Framework Convention Advisory Committee in the development of a more justice-oriented approach to minority rights in Europe. This is because it has been argued that the international community has been most influenced by the security agenda in relation to ECE States.¹¹⁰ However, many of the observations apply more generally across the board.

The development of an effective monitoring system under the Framework Convention was one of the early successes of the Advisory Committee, which was initially established ‘to assist in the evaluation of the adequacy of measures’ taken by States.¹¹¹ It is now standard procedure for the Advisory Committee to receive and invite information from sources other than States and to visit States whose reports are being considered, where its members will meet with a number of different actors and also visit minority areas. Similar to the exchange of letters between the HCNM and government ministers, States are given an opportunity to comment before the Advisory Committee’s findings and recommendations are made public. In addition, a number of follow-up visits have been made to States and follow-up seminars with

¹⁰⁷ Art. 1 of the Framework Convention.

¹⁰⁸ There are now 39 States Parties to the Framework Convention, with notable exceptions including Belgium, Greece, France and Turkey. See note 102.

¹⁰⁹ For a recent overview of the content of the minority protection scheme developed by the Advisory Committee, see Ringelheim, *loc.cit.* (note 8).

¹¹⁰ Kymlicka and Opalski (eds.), *op.cit.* (note 8).

¹¹¹ E.g. Philipps, A., *The Framework Convention for the Protection of National Minorities: A Policy Analysis*, Minority Rights Group International, London 2002; PACE Recommendation 1623 (2003) Rights of national minorities (29 September 2003), commending ‘the outstanding work of the advisory committee of the Framework Convention’ (para. 2), and Topidi, K., ‘Articles 24–26’, in: Weller (ed), *loc.cit.* (note 23), at pp. 573–587.

representatives from government bodies, national minorities and the Advisory Committee to consider the most appropriate ways of translating the findings into action have taken place.¹¹² This too mirrors the practice of the HCNM, whose work is primarily based around State visits and who often sponsors roundtables and seminars in States. There does, therefore, appear to be some evidence to support Letschert's claim that there has been a convergence in the working methods and approaches of the HCNM and the Advisory Committee.¹¹³ It is, however, the Advisory Committee's substantive outputs that are of the most relevance in demonstrating the development of a more justice-oriented approach.¹¹⁴

The first, and most obvious, example of this is the Advisory Committee's consistency in adopting an 'inclusive' and 'pragmatic' approach to questions relating to the Framework Convention's scope of application, which means that its attention is not exclusively focused on the situation of minorities in kin-States.¹¹⁵ The Roma feature particularly prominently, not only under Articles 4 (on equality) and 6 (on tolerance and understanding) but also in relation to Articles 12 and 14 on education. Perhaps more surprising are the increased references to 'new' minorities and immigrants, although the possibility of extending the Framework Convention's scope of application to immigrant groups was always a possibility given the omission of a definition of the term 'national minority'.¹¹⁶ Initially, a lot of these references were made in relation to Article 6(1), which requires States:

To encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and co-operation among *all persons* living on their territory, irrespective of those persons' ethnic, cultural, linguistic or religious identity, in particular in the fields of education, culture and the media.¹¹⁷

¹¹² For further information on the early development of the Advisory Committee's role, see ACFC 'First Activity Report covering the period from 1 June 1998 to 31 May 1999' ACFC/INF(99)1def. (15 September 1999); ACFC 'Second Activity Report covering the period from 1 June 1999 to 31 October 2000' ACFC/INF(2000)001 (30 November 2000); ACFC 'Third Activity Report covering the period from 1 November 2000 to 31 May 2002' ACFC/INF(2002)001 (31 May 2002) and ACFC 'Fourth Activity Report covering the period from 1 June 2002 to 31 May 2004' ACFC/NF(2004)001 (1 June 2004).

¹¹³ Letschert, *op.cit.* (note 23), at p. 431.

¹¹⁴ The observations made in this section are based on a comprehensive examination of Advisory Committee Opinions adopted to date, available at www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/Table_en.asp.

¹¹⁵ The Advisory Committee's position on the scope of application and the position of Member States are examined in much greater depth in Craig, *loc.cit.* (note 8) and in Verstichel, A., 'Personal Scope of Application: An Open, Inclusive and Dynamic Approach – The FCPNM as Living Instrument', in: Verstichel, A. et al. (eds.), *The Framework Convention for the Protection of National Minorities: A Useful Pan-European Instrument?*, Intersentia, Antwerp, Oxford and Portland, 2008, pp. 5–17.

¹¹⁶ Keller, P., 'Re-thinking Ethnic and Cultural Rights in Europe', *Oxford Journal of Legal Studies*, Vol. 18, 1998, pp. 29–59.

¹¹⁷ Emphasis added.

However, the Advisory Committee is increasingly also making recommendations that apply to these groups under other substantive provisions.¹¹⁸ This inclusive approach could in itself be considered to be indicative of a more justice-oriented approach. Kymlicka considers the granting of 'polyethnic' rights to immigrant groups to be justified in the interests of helping such groups 'express their cultural particularity and pride without it hampering their success in the economic and political institutions of the dominant society'.¹¹⁹ This includes the provision of public funding to support their cultural practices¹²⁰ and involves the need 'to ensure that the mainstream culture is hospitable to immigrants, and to their expression of ethnic differences'.¹²¹ Examples cited in his later work include religious accommodation, the funding of cultural or minority organisations, media representation, the provision of multicultural or mother-tongue education as well as affirmative action policies,¹²² all issues that are addressed to some extent under the Framework Convention.¹²³

The second example relates to the predictability of the recommendations made with a focus on legal and institutional frameworks under Article 4; the need for more support for cultural identity under Article 5 and in relation to the media under Article 9; interethnic and intercultural relationships generally under Article 6; the right to use minority languages before administrative authorities under Article 10; signage and names/patronyms under Article 11; intercultural and multicultural education under Article 12; teaching in and of minority languages under Article 14; and effective participation in relation to electoral representation, socio-economic life, administrative life and in relation to consultative mechanisms under Article 15. Relationships with kin-States tend to be addressed under Articles 17 and 18. Many of these recommendations are formulated in very general terms and could be applied to any Member State. Meanwhile, concerns about the right to self-identify, data collection and citizenship as differentiating criteria for protection are extremely common under Articles 3 (right to self-identify) and 4 (equality and non-discrimination). This consistency, even predictability, in approach, is also, to some extent, underscored by the development of the Advisory Committee's thematic work, considered in the next section of this article. Slightly less predictable are recommendations made under Articles 7 (rights of assembly, association, expression and religion), 8 (right to manifest religion) and 13 (right to establish private schools), but these provisions have a slightly different status as these are rights that are recognised under general human rights law rather than 'special' minority rights.¹²⁴

¹¹⁸ See Craig, *loc.cit.* (note 8).

¹¹⁹ Kymlicka, *op.cit.* (note 9), at p. 31.

¹²⁰ *Ibidem*, at pp. 30–31.

¹²¹ *Ibidem*, at p. 96.

¹²² Kymlicka, *op.cit.* (note 18), at p. 260.

¹²³ For a detailed overview of the provisions of the Framework Convention and their early interpretation by the Advisory Committee, see Weller (ed.), *op.cit.* (note 23).

¹²⁴ The former are explicitly recognised in Articles 9–11 of the ECHR, with the right to establish private schools recognised under Article 13(4) International Covenant on Economic, Social and Cultural Rights 1966.

The third example is the increasing rigour with which the Advisory Committee raises concerns (and makes recommendations) relating to discrimination and collective prejudices, in particular under Articles 4 and 6 of the Framework Convention.¹²⁵ In this regard, it is significant that Article 4(2) specifically requires States 'to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, *full and effective equality* between persons belonging to a national minority and those belonging to the majority'.¹²⁶ This goes beyond the classical liberal approach and suggests that 'special measures that take into account the specific conditions of the persons concerned' may be required in some circumstances.¹²⁷ This provision has, to date, been rather under-utilised with the focus primarily on the adoption of anti-discrimination legislation¹²⁸ and on educative measures¹²⁹ and, more recently, on data collection and the Roma.

It has already been noted that the HCNM will often address issues now coming within the remit of the Advisory Committee in his recommendations to States. However, whilst the HCNM focuses primarily on the situation of minority groups with kin-States, the Advisory Committee often seems to avoid mentioning specific minority groups and has tended to adopt a much broader perspective in relation to issues previously touched upon by the HCNM. For example, whilst the HCNM expressed specific concerns about the training of a sufficient number of Hungarian language teachers in Slovakia,¹³⁰ one of the conclusions of the Advisory Committee in 2000 was that there was a lack of qualified teachers in minority languages generally, with a follow-up recommendation that Slovakia should strengthen its efforts in the field of teacher training.¹³¹ The Advisory Committee identified the introduction of a department for the training of Hungarian language teachers at Konstantin University as one option but stressed that the needs of individuals belonging to other minorities should also be accommodated.¹³² In a similar vein, the Advisory Committee noted that only certain minorities, including Hungarians, benefited from instruction in minority languages in Romania and that the Turks, Tatars, Russians and Bulgarians were no longer taught in their own languages, recommending that the government consult them to ascertain the extent to which their needs were being met.¹³³

This approach does not mean that the wider de-securitisation context in ECE States is ignored. Like the HCNM, the Advisory Committee gave considerable attention

¹²⁵ See Craig, *loc.cit.* (note 8), at pp. 317–324. On religious minorities in particular, see Berry, S., 'A Tale of Two Instruments: Religious Minorities and the Council of Europe's Rights Regime', 2012, published in this special issue.

¹²⁶ Emphasis added.

¹²⁷ Explanatory Report, para. 39.

¹²⁸ Craig, *loc.cit.* (note 8), at p. 318.

¹²⁹ Alfredsson, G., 'Article 4', in: Weller (ed.), *op.cit.* (note 23), pp. 141–152, at p. 150.

¹³⁰ Letter to the Minister for Foreign Affairs of the Republic of Slovakia, dated 20 June 1994.

¹³¹ 'Opinion on Slovakia' (22 September 2000) ACFC/INF/OP/I(2001)001, s. V (in respect of Art 14).

¹³² *Ibidem*, at para. 45.

¹³³ 'Opinion on Romania' (6 April 2001) ACFC/INF/OP/I(2002)001, paras. 62 & 64.

to educational reform in Estonia and to the decision that Estonian would be the language of instruction in upper secondary schools from 2007, addressing the issue under all three of the provisions on education.¹³⁴ Although the Advisory Committee's recommendations to Estonia tend to be formulated in general terms, its specific concern for the situation of the Russian minority and the implications of educational reform is clear.¹³⁵ There are, of course, also instances when the Advisory Committee is faced with ongoing tensions related to an earlier conflict situation, as well as the political consequences of any subsequent peace settlement. For example, the Advisory Committee expressed concern about the continued lack of trust between different groups as well as hostility related to the return both of refugees and those that had been displaced in response to Bosnia and Herzegovina's first report.¹³⁶ The Advisory Committee also had to accept the institutional arrangements implemented as a result of the Dayton Agreement, despite its concerns that such arrangements tended to marginalise the 'Other' in a way that was problematic for the purposes of complying with the requirements of the Framework Convention.¹³⁷ This situation illustrates that potential tensions between security and more justice-oriented approaches based on equality and freedom remain and highlights the need for continued cooperation between different institutions working in particular country situations.

The Advisory Committee's view appears to be that de-securitisation is required to ensure the successful pursuit of more justice-oriented goals.¹³⁸ In States where there has been a history of tensions between groups, the Committee tends to focus considerable attention on intergroup relations and outstanding issues relating to the return and destruction of property and war memorials under Article 6 (on tolerance and intercultural dialogue).¹³⁹ The Advisory Committee does not, however, engage in conflict resolution and tensions between groups that could escalate tend to be only considered to the extent that they impede the State's ability to comply with its *core* obligations under the Framework Convention and to the extent that they reflect a *regressive* trend on the part of the State to minority protection issues. For example, the Advisory Committee found in relation to Azerbaijan in the first cycle that 'the Nagorno-Karabakh conflict has resulted in hundreds of thousands of refugees and internally displaced persons and considerably hampered efforts to implement the Framework Convention'¹⁴⁰ with a particular focus on damage to religious sites under

¹³⁴ 'Opinion on Estonia' (14 September 2001) ACFC/INF/OP/I(2002)005, section V (in respect of Arts. 12–14).

¹³⁵ *Ibidem*, at paras. 47 and 50.

¹³⁶ 'Opinion on Bosnia and Herzegovina' (27 May 2004) ACFC/INF/OP/I(2005)003, p. 3.

¹³⁷ *Ibidem*, at para. 119.

¹³⁸ On desecuritisation as a precondition of multicultural citizenship, see Kymlicka, *op.cit.* (note 21), at pp. 106–107.

¹³⁹ E.g. 'Second Opinion on Bosnia and Herzegovina' (9 October 2008) ACFC/OP/II(2008)005, paras. 115–136 and 'Second Opinion on Poland' (20 March 2009) ACFC/OP/II(2009)002, paras. 75–106.

¹⁴⁰ 'Opinion on Azerbaijan' (22 May 2003) ACFC/INF/OP/I(2004)001, para. 90.

Article 5 (right to cultural identity)¹⁴¹ and population changes in minority areas under Article 15 (on effective participation).¹⁴² The Advisory Committee did not, however, get involved in the details of the dispute and the Committee of Ministers merely expressed the hope that ‘a lasting and peaceful solution to the existing conflict will be found and that efforts to that effect will be accelerated’.¹⁴³ Similar concerns about the potential impact of tensions on a State’s ability to implement the provisions of the Framework Convention have been expressed in relation to Georgia concerning South Ossetia and Abkhazia and the Russian Federation concerning the N. Caucasus, where the involvement of other parties such as the Council of Europe’s High Commissioner for Human Rights and the HCNM have been noted.¹⁴⁴ This appears to confirm that security is not the Advisory Committee’s main concern, although the expectation remains that the pursuit of justice will, in most instances, contribute towards, rather than undermine, de-securitisation.¹⁴⁵ This expectation is perhaps best illustrated by the monitoring process undertaken in relation to Kosovo under a Special Agreement, which was specifically drafted to ensure accountability in relation to European minority rights standards under the transitional government arrangements.¹⁴⁶ However, this is not the only example.¹⁴⁷

Kymlicka’s initial assessment was that the new ‘justice-based’ approach to minority rights in Europe was ‘very weak’¹⁴⁸ because of the lack of an explicit endorsement of territorial autonomy for national minorities and the neglect of issues relating to official language status and mother-tongue universities.¹⁴⁹ It is true that the Advisory Committee makes few references to self-government, apparently respecting the position adopted by the drafters. Self-government is sometimes mentioned but only when the State is engaged in the development of self-government structures.¹⁵⁰ References to national cultural autonomy, which is a lot less controversial, tend to

¹⁴¹ *Ibidem*, at para. 100.

¹⁴² *Ibidem*, at para. 122.

¹⁴³ Resolution ResCMN(2004)8 (13 July 2004).

¹⁴⁴ E.g. ‘Opinion on Georgia’ (19 March 2009) ACFC/OP/I(2009)00, ‘Opinion on the Russian Federation’ (13 September 2002) ACFC/INF/OP/I(2003)005 and ‘Second Opinion on the Russian Federation’ (11 May 2006) ACFC/OP/II(2006)004.

¹⁴⁵ This fear is tackled directly by the Advisory Committee in ‘Opinion on Azerbaijan’, *loc cit.* (note 140), para. 124: ‘The Advisory Committee *considers* it important to ensure that critical statements in support of improved protection of national minorities are not as such deemed to imply support for separatism or a threat to territorial integrity.’

¹⁴⁶ Agreement between the United Nations Interim Administration Mission in Kosovo (UNMIK) and the Council of Europe on technical arrangements related to the Framework Convention for the Protection of National Minorities, 30 June 2004.

¹⁴⁷ For example, the Advisory Committee has on occasion highlighted the danger that tensions over language issues might lead to conflict (e.g. ‘Opinion on Moldova’ (1 March 2002) ACFC/INF/OP/I(2003)002, para. 118).

¹⁴⁸ Kymlicka, *op.cit.* (note 12), p. 386.

¹⁴⁹ *Ibidem*, at pp. 371–373.

¹⁵⁰ For example, the self-government structures in Hungary have been considered extensively under a range of different provisions (‘Opinion on Hungary’ (22 September 2000) ACFC/INF/OP/I(2001)004;

feature more prominently.¹⁵¹ It is also true that few references are made to higher education, although it is not ignored completely and the extent to which the Advisory Committee refers to it seems to depend on whether or not the issue of higher education is raised by those belonging to minority groups.¹⁵² Furthermore, whilst explicit references to ‘official language status’ are rare,¹⁵³ the Advisory Committee consistently makes recommendations under Article 10 in relation to the use of minority languages in dealings with administrative authorities.¹⁵⁴ It is, however, the thematic work of both the HCNM and the Advisory Committee which give the greatest indication of the move towards a more justice-oriented approach.

6. THE SIGNIFICANCE OF THE ADVISORY COMMITTEE’S THEMATIC WORK

According to Letschert, ‘As soon as the HCNM encouraged the elaboration of the general guidelines, the idea of the High Commissioner as only a pure conflict prevention mechanism was abolished’.¹⁵⁵ The original idea was the development of ‘a series of policy guidelines’, which could be referred to when dealing with issues that had proven particularly sensitive in the context of his work and which ‘were to be based on, and in total accordance with, the letter and spirit of existing human rights instruments’.¹⁵⁶ The Hague Recommendations Regarding the Educational Rights of

‘Second Opinion on Hungary’ (9 December 2004) ACFC/INF/OP/II(2004)003 and ‘Third Opinion on Hungary’ (18 March 2010) ACFC/OP/III(2010)001).

¹⁵¹ For example, issues relating to cultural autonomy were considered under Article 5 in relation to Estonia, Romania, the Russian Federation and Ukraine during the second monitoring cycle (‘Second Opinion on Estonia’ (24 February 2005) ACFC/INF/OP/II(2005)001, paras. 66–69; ‘Second Opinion on Romania’ (24 November 2005) ACFC/OP/II(2005)007, paras. 67–74; ‘Second Opinion on the Russian Federation’ (11 May 2006) ACFC/OP/II(2006)004, paras. 88–95 and ‘Second Opinion on the Ukraine’ (30 May 2008) ACFC/OP/II(2008)004, paras. 88–97).

¹⁵² For example, minority languages in higher education were considered in relation to Estonia, The Former Yugoslav Republic of Macedonia, Moldova, Slovak Republic and Ukraine during the second monitoring cycle (‘Second Opinion on Estonia’ (24 February 2005) ACFC/INF/OP/II(2005)001, paras. 129–132; ‘The Former Yugoslav Republic of Macedonia’ (23 February 2007) ACFC/OP/II(2007)002, paras. 153 and 178; ‘Second Opinion on Moldova’ (9 December 2004) ACFC/INF/OP/II(2004)004, para. 127; ‘Second Opinion on Slovak Republic’ (26 May 2005) ACFC/OP/II(2005)004, para. 103 and ‘Second Opinion on Ukraine’ (30 May 2008) ACFC/OP/II(2008)004, paras. 174–177).

¹⁵³ E.g. ‘Second Opinion on the Russian Federation’ (11 May 2006) ACFC/OP/II(2006)004, para. 192.

¹⁵⁴ Art. 10(2) provides: ‘In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if those persons so request and where such a request corresponds to a real need, the Parties shall endeavour to ensure, as far as possible, the conditions which would make it possible to use the minority language in relations between those persons and administrative authorities.’

¹⁵⁵ Letschert, *op.cit.* (note 23), at p. 225.

¹⁵⁶ Sieminski, G. (then Programme Consultant to the Foundation on Inter-Ethnic Relations) and Packer, J. (then Legal Advisor to the HCNM), ‘Integration through Education: The Origin and Development of the Hague Recommendations’, *International Journal on Minority and Group Rights*, Vol. 4, 1997, pp. 187–198, at p. 191.

National Minorities (1996); the Oslo Recommendations Regarding the Linguistic Rights of National Minorities (1998) and the Lund Recommendations on the Effective Participation of National Minorities in Public Life (1999) were drafted at the request of the first HCNM by a group of international experts under the auspices of the Foundation on Inter-Ethnic Relations.¹⁵⁷ Although the recommendations are fairly ambitious, their ultimate purpose was ‘to encourage and facilitate the adoption by States of specific measures to alleviate tensions related to national minorities and thus to serve the ultimate conflict prevention goal of the HCNM’.¹⁵⁸ There is, therefore, a problem with identifying recommendations that the curriculum in primary school ‘should ideally be taught in the minority language’,¹⁵⁹ and that those belonging to national minorities ‘should have access to tertiary education in their own language when they have demonstrated the need for it and when their numerical strength justifies it’,¹⁶⁰ as the equivalent of new ‘legal norms’¹⁶¹ or even as ‘soft law’¹⁶² rather than as more aspirational guidelines or examples of best practice.

Like the HCNM, the Advisory Committee recognised the specific importance of education in relation to minority protection issues, adopting its first Commentary on Education on 2 March 2006.¹⁶³ This event was followed by the adoption of a second Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and Public Affairs on 27 February 2008.¹⁶⁴ The purposes of the Advisory Committee’s commentaries are quite different to the thematic work developed with the support of the HCNM. For example, the purposes of the Commentary on Education included summarising the experiences of the Advisory Committee under the first monitoring cycle, identifying issues that require more attention in the future and highlighting some of the tensions encountered.¹⁶⁵ It was also considered that it would be useful to identify ways in which the principles in the Framework Convention could be implemented. As a result, an inventory of issues addressed by the Advisory Committee on an article-by-article basis was included as an Appendix to the final text.¹⁶⁶ The Commentary confirms that both pre-school and higher education are included within the Advisory Committee’s ‘wide understanding’ of the term education in Article 12,¹⁶⁷ that the imposition of ‘segregating, special

¹⁵⁷ These and later recommendations are available at www.osce.org/hcnm/66209.

¹⁵⁸ This is the explicit wording used in the Lund Recommendations (at p. 6).

¹⁵⁹ Hague Recommendations, para. 6.

¹⁶⁰ *Ibidem*, at para. 17.

¹⁶¹ Ratner, *loc.cit.* (note 90), at p. 645.

¹⁶² Bloed, A. and Letschert, R., ‘The OSCE High Commissioner on National Minorities’, in: Henrard, K. and Dunbar, R. (eds.), *Synergies in Minority Protection: European and International Law Perspectives*, Cambridge University Press, Cambridge, 2008, pp. 88–118, at pp. 105–106.

¹⁶³ CoE Doc. ACFC/25DOC(2006)002.

¹⁶⁴ CoE Doc. ACFC/31DOC(2008)001.

¹⁶⁵ *Loc.cit.* (note 163), p. 5.

¹⁶⁶ ACFC ‘19th meeting, 24–28 May 2004’ CoE Doc. ACFC/MR/INF(2004)002 (26 May 2005), para 16.

¹⁶⁷ *Loc.cit.* (note 163), at p. 13.

classes' for Roma children is unacceptable¹⁶⁸ and that 'States Parties must actively pursue needs' assessments and involve minorities in the design and implementation of measures to ensure the implementation of Article 14, including the right unequivocally guaranteed under Article 14(1).¹⁶⁹ However, it also goes further by providing information on different methods and structures that can be used to accommodate minority language education in schools,¹⁷⁰ and issuing guidelines on how to ensure access to good equality education.¹⁷¹ In providing guidance on States' obligations under Article 14, it is interesting to note that the Advisory Committee refers explicitly to the Hague Recommendations as well as to the 'Four-A scheme' (Availability, Accessibility, Acceptability and Adaptability) developed by the International Committee on Economic, Social and Cultural Rights. It stresses, in particular, the need for education to be acceptable to students and parents and adaptable 'to the needs of changing societies and communities and to respond to the needs of students within their diverse social and cultural settings'.¹⁷² The ambition of the Advisory Committee in promoting good practice in the area of education, as well as in providing guidance on the interpretation of the relevant provisions, is therefore clear.

It has been argued that the Framework Convention, by requiring States to foster intercultural dialogue between groups and to ensure conditions for effective participation of persons belonging to national minorities in 'cultural, social and economic life, and public affairs',¹⁷³ has added to the traditional minority protection pillars of equality and the protection of identity and thereby also contributed to the promotion of multiculturalism.¹⁷⁴ An examination of the Advisory Committee's comments under Article 15 reveal the broad range of issues considered to come within the remit of the right to effective participation and the range of mechanisms available, with a number of States having a Council for National Minorities¹⁷⁵ and arrangements for cultural autonomy.¹⁷⁶ The Advisory Committee has commented extensively on such arrangements.¹⁷⁷ Other issues addressed consistently under Article 15 include electoral representation and process as well as participation in public administration and more generally in economic and social life, with a strong link to the duty to promote effective equality under Article 4.¹⁷⁸

The centrality of Article 15 to the Advisory Committee's work is clearly evident both in the expansive range of issues addressed and in the language used in the

¹⁶⁸ *Ibidem*, at p. 17.

¹⁶⁹ *Ibidem*, at pp. 24–5.

¹⁷⁰ *Ibidem*, at p. 16.

¹⁷¹ *Ibidem*, at pp. 21–22.

¹⁷² *Ibidem*, at pp 27–28.

¹⁷³ Art. 15.

¹⁷⁴ Ringelheim, *loc.cit.* (note 8).

¹⁷⁵ E.g. Bosnia and Herzegovina, Moldova, Romania, Serbia and Slovak Republic.

¹⁷⁶ See note 151.

¹⁷⁷ Commentary, *loc.cit.* (note 164), pp. 28–30 and 33.

¹⁷⁸ *Ibidem*, at pp. 5 and 12.

Commentary on Effective Participation,¹⁷⁹ with such participation considered to be 'essential to ensure social cohesion and the development of a truly democratic society'.¹⁸⁰ The Advisory Committee's emphasis on effective participation is reflective of an increasing emphasis within the wider literature on the right to democratic participation for minorities¹⁸¹ and on the role of deliberation and negotiation in relation to discussions about the requirements of justice in '[t]he dialogically constituted multicultural society'.¹⁸² The purposes of the Commentary include highlighting the interpretation of Article 15 by the Advisory Committee to date and providing 'a useful tool' for States and other relevant actors involved in the area of minority protection.¹⁸³ These purposes have led Marko to conclude that the Commentary contains 'soft jurisprudence' that 'will serve as a legal standard of review for both the AC itself and national courts, if they make use of it'.¹⁸⁴ The content of the Commentary has been explored elsewhere.¹⁸⁵ Given Kymlicka's criticisms of earlier failures to recognise a right to autonomy, it is, nevertheless, worth noting the reaffirmation that there is no right to either cultural or territorial autonomy¹⁸⁶ alongside the concession that, 'in the State Parties in which territorial autonomy arrangements exist, as a result of specific historical, political and other circumstances, they can foster a more effective participation of persons belonging to national minorities in various areas of life'.¹⁸⁷ There does, nonetheless, appear to be increasing recognition that effective participation can take many different forms and that justice can be promoted through effective representation that falls short of the special representation and self-government rights advocated by Kymlicka in *Multicultural Citizenship*.¹⁸⁸

¹⁷⁹ *Ibidem*, at pp. 10–11.

¹⁸⁰ *Ibidem*, at p. 10.

¹⁸¹ E.g. Weller, M. (ed), *Political Participation of Minorities: A Commentary on International Standards and Practice*, Oxford University Press, Oxford, 2010, in particular Wheatley, S., 'Minorities, Political Participation and Democratic Governance under the European Convention on Human Rights', pp. 177–221.

¹⁸² This is the term used by Parek. See Parek, B., *Rethinking Multiculturalism: Cultural Diversity and Political Theory*, Palgrave Macmillan, Basingstoke, 2006, at p. 340.

¹⁸³ Commentary, *loc.cit.* (note 164), at para. 3.

¹⁸⁴ Marko, J., 'The Council of Europe Framework Convention for the Protection of National Minorities and the Advisory Committee's Thematic Commentary on Effective Participation', in: Weller (ed), *op.cit.* (note 181), pp. 222–255, at p. 228.

¹⁸⁵ *Ibid.*

¹⁸⁶ Commentary, *loc.cit.* (note 164), para.133.

¹⁸⁷ *Ibidem*, at para. 134.

¹⁸⁸ *Op.cit.* (note 9).

7. CONCLUSION

The evidence presented here suggests that there is some authority for the assessment that it was the security-track that initially prevailed in the 'new' Europe.¹⁸⁹ The argument made in this article is that this has changed since the coming into force of the Framework Convention with increasing evidence of a more justice-oriented approach in the 'soft jurisprudence' of the Framework Convention Advisory Committee. The analysis presented here has demonstrated how both political and legal considerations tend to inform the work of both the HCNM and the Advisory Committee, supporting the claim that talk of two separate 'minority rights' tracks is no longer appropriate. The Advisory Committee's emphasis on maintaining an on-going dialogue with States has led many to draw comparisons with the role of the HCNM. However, the Advisory Committee tends to consider the situation of a much wider range of minority groups (and of course States) than the HCNM, who tends to focus on the situation of minorities with kin-States. Other differences relate to the types of issues addressed and to the development of consistency in its article-by-article examination of State performance. At a time when Europe is facing new challenges in reconciling freedom and diversity,¹⁹⁰ the Advisory Committee's flexible and pragmatic approach both to the Framework Convention's scope of application and in relation to key substantive issues such as the right to effective participation means that it is well-placed to address some of the most pressing injustices faced by those belonging to a range of minority groups. This is not to deny the fact that problems remain. It has, for example, been argued that greater collaboration is needed between the Office of the HCNM and the Advisory Committee to avoid inconsistencies in the recommendations made to States.¹⁹¹ Meanwhile, there are increasing calls for greater attention to be given within both organisations to 'new' minorities.¹⁹² It is hoped that such initiatives will result in a further strengthening, rather than an undermining, of the more justice-oriented approach that has been established by the Framework Convention Advisory Committee.

¹⁸⁹ See also Nobbs, *loc.cit.* (note 88), who agrees with Kymlicka's assessment.

¹⁹⁰ See Report of the Group of Eminent Persons of the Council of Europe, *loc.cit.* (note 6).

¹⁹¹ Bloed and Letschert, *loc.cit.* (note 162), who give specific examples of inconsistencies (at pp. 99–100).

¹⁹² E.g. Bloed and Letschert, *ibidem*, on the HCNM and Craig, *loc.cit.* (note 8) on the Advisory Committee.